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Supreme Court, U.S.
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No. 08 -- _____

IN THE

Supreme Court of the United States

D'ANNA BATES,

Petitioner(s)

v.

LEE HARVEY

Respondent(s)

On Petition for Writ of Certiorari To the
Unites States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Physical Entry Of The Home Is The Chief Evil Against Which The Fourth Amendment Is Directed. Without a Warrant, Consent Or Exigent Circumstances, Harvey Entered The Bates' Home To Search For A Non-Resident Who Was The Subject Of A Civil Commitment Order.

WHETHER THE COURT OF APPEALS DECISION DIRECTLY CONFLICTS WITH THE COURT'S DECISION IN HOPE V. PELZER AS THE COURT REFUSED TO APPLY GENERAL CONSTITUTIONAL RULES IN A NOVEL FACTUAL CIRCUMSTANCE?

WHETHER CLEARLY ESTABLISHED LAW GAVE HARVEY FAIR WARNING THAT A CIVIL COMMITMENT ORDER DID NOT CREATE EXIGENT CIRCUMSTANCES JUSTIFYING WARRANTLESS ENTRY INTO THE HOME OF A THIRD PARTY TO SEARCH FOR THE NON-RESIDENT SUBJECT OF THE ORDER?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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OPINIONS BELOW

The district court's order denying summary judgment is not published in the Federal Supplement. The court of appeals' decision is reported as *Bates v. Harvey, 518 F.3d 1233 (11th Cir. 2008).*

STATEMENT OF JURISDICTION

Bates petitions for review from a decision rendered by the Unites States court of appeals for the Eleventh Circuit on March 4, 2008. *See infra*, App. A. The Court of Appeals accepted jurisdiction to consider Harvey's interlocutory appeal from the district court's order denying summary judgment on qualified immunity grounds. *See infra*, App.C. Bates filed a Petition for Rehearing and Rehearing En Banc. The court of appeals denied rehearing on May 6, 2008. See *infra*, App. B.

Bates now files her Petition for writ of certiorari to the Court of Appeals for the Eleventh Circuit pursuant to 42 U.S.C. § 1254, which confers jurisdiction upon the Supreme Court to review a judgment rendered by the court of appeals.

CONSTITUTIONAL & STATUTORY PROVISIONS

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched and the persons or things to be seized.

O.C.G.A. § 37-7-41(b)
[CIVIL COMMITMENT ORDER]

The appropriate court of the county in which a person may be found may issue an order commanding any peace officer to take such person into custody and deliver him forthwith for examination, either to the nearest available emergency receiving facility serving the county in which the patient is found, where such person shall be received for examination, or to a physician who has agreed to examine such patient and who will provide, where appropriate, a certificate pursuant to subsection (a) of this Code section to permit delivery of such patient to an emergency receiving facility pursuant to subsection (a) of this Code section. Such order may only be issued if based either upon an unexpired physician's certificate, as provided in subsection (a) of this Code section, or upon the affidavits of at least two persons who attest that, within the preceding 48 hours, they have seen the person to be taken into custody and that, based upon observations contained in their affidavit, they have reason to believe such person is an alcoholic, a drug dependent individual, or a drug abuser requiring involuntary treatment. The court order shall expire seven days after it is executed.

STATEMENT OF THE CASE

D'Anna and Gary Bates have lived together at 963 Roberts Quarters Road in Pike County, Georgia. (hereinafter "Bates' Home") for many years. [R-Ex-38, p. 7-8]. On March 21, 2003, three other persons were

living in the Bates' Home: Sarah Bates, Gary Bates' 14 year old daughter ("S.B."); Hannah Bates, Gary Bates' 18 year old daughter ("H.B."); and Christopher Laughery, Bates' 19 year old son ("C.L.").

Shortly after midnight on March 21, 2003, C.L. snuck his friend, Tyler Wilson ("T.W."), into the Bates' Home. [R-Ex-41, p. 18-19]. D'Anna, Gary, S.B. and H.B. were asleep. They had no idea T.W. was there. [R3-47-Ex.7, p.220; R-Ex-41, p. 18-19].

T.W. lived with his parents, Mark and Wanda Wilson, ("the Wilsons") in nearby Upson County. [R-Ex-41, p. 5-6]. However, T.W. had apparently been staying away from his home for some time. [R-Ex-41, p.18]. The Wilsons were worried about him because they had not seen him for several days. [R-Ex-41, p. 6, 17-18].

On March 21, 2003, the Wilsons appeared before a local magistrate and secured a Civil Commitment Order for T.W. [R3-47-Ex. 13, p. 145; Ex. 21]. The Civil Commitment Order and supporting document consisted of "fill in the blank" forms. [R3-47-Ex. 21]. The Wilsons only specific averments were: "(Mr. Wilson) says his son is a drug abuser will not go to school, work, he says he does (sic) care about anything;" and "(Ms. Wilson) says her son needs help before he hurts himself or someone else." The Wilsons delivered the Civil Commitment Order to Sergeant David Walker ("Walker") at the Upson County Sheriff Department. Ms. Wilson told Walker that T.W. might be found at the Bates' Home. [R3-47-Ex. 13, p. 145].

Walker drove to Pike County. He traveled at a normal speed and did not activate his emergency lights

or siren. Since he was outside of Upson County, he called the Pike County Sheriff's Office for assistance. (R3-47-Ex. 13, p. 145-46). Defendant Deputy Lee Harvey ("Harvey") was on duty and was dispatched to meet him. The officers met at a nearby convenience store where Harvey looked over the Civil Commitment Order. They left and drove to the Bates' Home at a normal rate of speed, without activating their emergency lights or sirens. [R3-47-Ex. 13, p. 145-48]. When they arrived, they parked in plain view of the Bates' Home. [R3-47-Ex. 13, p. 147].

Other than Ms. Wilson's speculation as to T.W.'s whereabouts, the officers had no reason to believe T.W. was actually in the Bates' Home. [See R4-55, p. 13; R-Ex-41, p. 17-18]. As they walked up the driveway, they did not see or hear anything that concerned them in any way. They had no independent reason to believe that anyone was in any danger.

Harvey and Wilson knocked on the kitchen door. S.B. came to the door. S.B. recalled that,

> . . . I was in my kitchen cooking breakfast and two police officers knocked on the door. And I opened the door and they asked if Tyler was there and I told them no, he was not there. And they asked who else was there and I told them my sister. And before I had a chance to tell them who else was in the house, they asked if they could come in and search the house. I told them I didn't know and they came in anyway.[1]

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1 Harvey disputed Sarah's testimony. He claims that she gave

As their questions indicated, the officers did not know whether T.W. was in the Bates' Home at all, much less know that he was in any danger. Nevertheless, Harvey and Walker brushed past Sarah and crossed the threshold of the Bates' Home.

The officers found T.W. asleep in C.L.'s room. C.L. was also asleep. H.B. was in an adjacent room, lying in her bed. The officers did not see or hear anything suggesting that anyone at all, including T.W., was in any danger. [R3-47-Ex. 12, p. 184; see also, R3-47-Ex. 9-11, p. 17-18; R3-47-Ex. 13, p. 165]. Harvey and Walker woke the boys up. Walker told T.W. to get dressed, while Harvey started rifling through items on C.L.'s dresser.

D'Anna Bates was in her bathroom. She heard a male voice shouting, "is this you? Is this you?" [R3-47, Ex. 5, p. 238-39; 240-242]. She walked across the house to a vestibule directly outside C.L.'s bedroom and saw the officers standing there. [R3-47, Ex. 5, p. 238-242]. D'Anna Bates described her interaction with Harvey during her criminal trial:

Q: When you got to the door, what did you say?
A: I said, "Do you have a search warrant?"
Q: And what – did either officer respond?
A: Officer Harvey said, "No, I have a court order."

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him permission to enter the Bates' Home and search for Wilson. [R3-47, Ex.10, 11, p. 147]. The district court, the court of appeals resolved this disputed issue of fact in Bates' favor. *See infra.* App. A, p. #, App C, p. #

[. . .]

Q: When he said he had a court order, what did you say?
A: That I needed to see it.

[. . .]

Q: What did you say next?
A: Well, he started trying to explain why a court order allowed him to be in my house. And I said, "I need to see a warrant, a search warrant, or you need to leave my house."
Q: How long do you think this back and forth between you and Officer Harvey went on?
A: Maybe a minute.

[...]

Q: Tell me what happened.
A: I think the last time I said, "either I need to see some documents or you need to leave my house," there was a pause, it seemed like a long time, but I'm sure it wasn't more than a few seconds. And all of a sudden he came at me and grabbed my arm.

[R3-47, Ex. 5, p. 242-244].[2]

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2 S.B., T.W., and Walker corroborated D'Anna's testimony. [R3-47, Ex. 12, p. 188; Ex. 15, p. 12-13; Ex. 13, p. 189] See [R-47, Ex.9-11, p. 67-72]..

Harvey grabbed D'Anna's arm and threw her to the ground. As he reached for his handcuffs, his watch got caught, and D'Anna wriggled out of his grasp. She moved away towards a bathroom, but Harvey followed. He grabbed her left shoulder, swung her around, and punched her in the face. [R3-47, Ex. 3-4, p. 110-127]. D'Anna hit the tile floor hard. Harvey grabbed her legs and dragged her out to the main room of the house. Walker joined the fray by helping Harvey hold D'Anna face down on the floor.

Gary Bates walked into his house to find Harvey and Walker manhandling his wife. The officers stood D'Anna up. Harvey exclaimed that he could explain everything. [R3-47, Ex. 3-4, p. 110-127]. Walker asked if D'Anna was under arrest. Harvey replied, "I don't know. Let me think about it." [R3-47, Ex.9-11, p. 91; 93].

Meanwhile, T.W. had escaped out C.L.'s bedroom window. [R-Ex-41, p. 13, 16-17]. Harvey gave chase, but to no avail. After several hours, Wilson was found on a nearby roadway by another officer. [R-Ex-38, p. 30-31]. He was not charged with any crimes. After giving up the chase for T.W., Harvey returned to the Bates' Home and arrested D'Anna for felony Obstruction. [R3-47, ¶¶ 74-75].

A Pike County Grand Jury indicted Bates for felony Obstruction. The case went to trial and a [R3-47, Ex. 18]. jury returned a "not guilty" verdict.

D'Anna Bates filed this federal civil rights action against Harvey in the United States District Court for the Northern District of Georgia on March 18, 2005. [R1-1]. Bates alleged that Harvey violated her Fourth Amendment rights when he arrested her for Obstruction (hereinafter "March 21st Arrest").[3]

Following discovery, Harvey moved for summary judgment and asserted, among other things, that he was entitled to qualified immunity. On January 9, 2007, the district court entered an order that, in pertinent part, denied qualified immunity. *See infra.* App. C.

Harvey filed an interlocutory appeal in the United States court of appeals for the Eleventh Circuit. The court of appeals reversed the district court. The court held that Harvey violated Bates' Fourth Amendment rights by entering her home without a warrant, consent or exigent circumstances; however, the court concluded Harvey was entitled to qualified immunity because pre-existing law did not give him fair warning that his conduct violated the constitution. *See infra,* App. A, p. 29.

Bates petitioned for reconsideration, but the court of appeals denied the request on May 6, 2008. See *infra,* App. B. Bates now timely files her Petition for writ of certiorari to the court of appeals for the Eleventh Circuit.

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[3] Bates' Complaint raised a number of additional claims stemming from two related arrests on March 21st and April 4, 2003. However, Bates voluntarily dismissed several claims. [R1-34; 35]. The district court granted summary judgment as to several others. [R4-55]. The issue before the Court deals solely with the circumstances of the March 21st Arrest.

ARGUMENT AND CITATION OF AUTHORITIES

The district court and the court of appeals found that Harvey presented no independent evidence of exigent circumstances. See *infra*, App. A, p. 27; App. C, p. 11. Both courts also properly rejected the dangerous notion that exigent circumstances can spring forth solely from the pre-printed averments on a court form. See *infra*, App. A, p. 29; App. C, p. 11. Whether Harvey violated Bates' Fourth Amendment rights simply was not a close question: the constitutional violation was readily apparent.

Given the obvious nature of the constitutional violation, one might think that D'Anna Bates would be busy preparing for jury trial. Instead, she finds herself here, making a last, desperate plea for justice. And she is here for just one reason: *this case involved a warrantless search of a third-party's home for the subject of a Civil Commitment Order, rather than the subject of an arrest warrant.*

Since neither this Court nor the court of appeals had ever confronted that precise factual scenario before, the court of appeals saw fit to hold that:

> "[u]nder then clearly established law, however, the contours of the Fourth Amendment were not sufficiently clear so as to give a reasonable officer fair and clear notice that the civil commitment order in this case did not invoke exigent circumstances exception to the warrant requirement as to Mrs. Bates' home."

See infra, App. A, p. 34.

This decision demonstrates that the court of appeals continues to reject this Court's precedent controlling proper resolution of cases involving the qualified immunity defense. See e.g., *Hope v. Pelzer, 536 U.S. 730, 741, 122 S.Ct. 2508 (2002).* This Court cannot countenance such a direct disavowal of its precedent, particularly when the underlying constitutional violation strikes at the core of Fourth Amendment protection. See *Johnson v. United States, 333 U.S. 10, 12-1")4, (1948)*("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.").

The Court should grant certiorari and reverse the decision of the court of appeals as it directly conflicts with prior precedent of this Court controlling issues of grave significance to ordinary citizens and the law enforcement community.

I. UNDER *HOPE V. PELZER,* CLEARLY ESTABLISHED LAW MAY GIVE FAIR WARNING EVEN IN NOVEL FACTUAL CIRCUMSTANCES

Just six years ago, the Court rejected the Eleventh Circuit's "materially similar" case requirement as a "rigid gloss on the qualified immunity standard [that] is not consistent with our cases." *Hope, 536 U.S. at 741.* The Court emphasized that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Id. (internal punctuation omitted).* Thus, "officials can still

be on notice that their conduct violates established law even in novel factual circumstances." *Id.*

Hope involved a gross violation of the cruel and unusual punishment clause of the Eighth Amendment. *Hope, 536 U.S. at 738.* Guards in an Alabama prison tied Larry Hope to a hitching post as punishment for poor behavior. *Id. at 734-35.* The Eleventh Circuit held that their conduct violated the constitution, but granted qualified immunity because no prior case had materially similar facts sufficient to establish the law with obvious clarity. *Id. at 736-37.*

The Court reversed, explaining that, arguably, "the violation was so obvious that our own Eighth Amendment cases gave the respondents fair warning that their conduct violated the Constitution." *Id. at 741.* The Court also relied on prior circuit precedents rejected by the Eleventh Circuit as "analogous," but not "materially similar," including *Gates v. Collier, 501 F.2d 1291 (1974). Id. at 738.* The *Gates* decision held, among other things, that "handcuffing inmates to the fence and to cells for long periods of time" violated the Eighth Amendment. *Gates, 501 F.2d at 1306.* Applying *Gates*, the Court in *Hope* explained that,

> for the purpose of providing fair notice to reasonable officers . . . there [was no] reason to draw a constitutional distinction between a practice of handcuffing an inmate to a fence for prolonged periods and handcuffing him to a hitching post for seven hours. *The Court of Appeals' conclusion to the contrary exposes the danger of rigid overreliance on factual similarity.*

Hope, 536 U.S. at 742 (emphasis added).

Just as in *Hope*, the court of appeals here has insisted upon a degree of "factual similarity" that has no place in this Court's qualified immunity jurisprudence. The only meaningful factual distinction between this case and the facts of *Steagald v. United States, 451 U.S. 204, 213-16, 101 S.Ct. 1642 (1981)* is that Harvey entered the Bates' Home in search of the subject of a Civil Commitment Order, rather than the subject of an arrest warrant. That formulaic distinction simply does not remove this case from the ambit of the clear constitutional rule set by the Court in Steagald. *Id.*, see also, *Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091 (1984)* (rejecting claim of exigent circumstances arising from warrantless seizure of D.U.I suspect in his home); *Thompson v. Louisiana, 469 U.S. 17, 21 105 S.Ct. 409 (1984)*(reversing murder conviction as warrantless search of apartment not permissible simply because a homicide had recently occurred there); *Mincey v. Arizona, 437 U.S. 385, 985 S.Ct. 2408 (1978)*(declining to hold that seriousness of offense under investigation (homicide) itself creates exigent circumstances justifying a warrantless search of a home). The Court should grant certiorari and reverse the decision of the court of appeals.

II. The Text Of The Fourth Amendment And The Decisional Law Established The Applicable law With Obvious Clarity

Anchored in the text of the Fourth Amendment, few constitutional rules offer clearer guidance to law enforcement than the bright line rule applicable to

Harvey's warrantless intrusion into the Bates' Home: *a warrantless entry into the home of a third-party, absent consent or exigent circumstances, violates the Fourth Amendment. Steagald, supra.* Harvey had no independent evidence of exigent circumstances, therefore, the issue is simply whether *Steagald's* straight forward mandate was sufficient to establish with obvious clarity that the averments in a Civil Commitment Order cannot alone establish exigent circumstances.

The Court's decision in *Steagald v. United States, 451 U.S. 204, 101 S.Ct. 1642 (1981)* rested firmly on two core tenets of Fourth Amendment jurisprudence. "It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Welsh v. Wisconsin, 466 U.S. 740, 104 S.Ct. 2091 (1984).* Accordingly, "[i]t is not surprising . . . that the Court has recognized as a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371 (1981).* The Court thus invalidated the warrantless search of Steagald's home, holding that a search warrant was necessary before law enforcement could enter the home of a third-party to search for the subject of an arrest warrant. *Steagald, 451 U.S. at 213-16.*

The Court noted that, without the checkpoint of a neutral magistrate between the Government and the citizen, police "[a]rmed solely with an arrest warrant for a single person . . . could search all the homes of that individual's friends and acquaintances." *Id.;* compare, *infra, App. A, p. 29.*

The Court also rejected the notion that civil lawsuits were a sufficient remedy for victims of unlawful searches and seizures. The Court noted that, "absent a search warrant requirement, a person seeking to recover civil damages for the unjustified search of his home may possible be thwarted if a good-faith defense to such unlawful conduct is recognized." *Id. at 216, n. 9.* Almost thirty years after the Court established a search warrant requirement, it is no small irony that Bates' may well be thwarted in this civil damages action by an overly rigid application of qualified immunity -- the modern construction of the common law "good faith defense." *Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982).*

Implicit to *Steagald*'s holding is the obvious conclusion that the averments in an arrest warrant, no matter the crime, do not alone create exigent circumstances trumping the warrant requirement. See *Mincey v. Arizona, 437 U.S. 385, 985 S.Ct. 2408 (1978). Mincey*, decided three years prior to *Steagald*, involved the warrantless search of an apartment following a drug raid. While acknowledging that "[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency," the Court "decline[d] to hold that the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Mincey*, 437 U.S. at 392, 394.

The Court has never so much as suggested that the averments in a warrant, no matter how grave the crime, can create exigent circumstances of the kind

necessary to trump the warrant clause of the Fourth Amendment. To the contrary, the Court has consistently emphasized that "exceptions to the warrant requirement are few in number and carefully delineated, and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welch, 466 U.S. at 749-750.*

With regard to exigent circumstances, the Court has recognized only a few emergency conditions justifying warrantless intrusion into the home. See e.g., *United States v. Santana, 427 U.S. 38, 42-43, 96 S.Ct. 2406 (1976)*(hot pursuit of a fleeing felon); *Schmerber v. California, 384 U.S. 757, 770-771, 86 S.Ct. 1826 (1966)* (destruction of evidence); *Michigan v. Tyler, 426 U.S. 499, 509, 98 S.Ct. 1942 (1978)*(ongoing fire); *Minnesota v. Olson, 495 U.S. 91, 95-96, 110 S.Ct. 1684 (1990)* (hot pursuit, destruction of evidence, prevent suspect's escape, risk of danger to the police or other persons inside or outside the dwelling); see also, *McClish et al v. Nugent et al, 483 F.3d 1231, 1240-41 (11th Cir. 2007)* (listing exigent circumstances, such as: "to break up a violent fight . . . to rescue a kidnaped infant, and to attend to a stabbing victim."). The "check box" facts on the form Civil Commitment Order bear no resemblance at all to these grave circumstances.

In sum, this case is not distinguishable in a "fair way" from *Steagald*. The risks attendant to executing a fugitive warrant for a suspected drug dealer are significant, as amply demonstrated by the way the officer approached the residence in *Steagald* – in numbers, with guns drawn. Those potential risks to life and limb, however, were not sufficient to

justify a warrantless search. The risks attendant to executing a Civil Commitment Order on a potential "at risk" juvenile simply do not compare, as amply demonstrated by the officers' conduct. Harvey and Walker acted without any sense of urgency and, indeed, never claimed exigent circumstances as a justification for their warrantless entry into the Bates' Home. Cf, *Scott v. Harris*, --- U.S. ---, 127 S.Ct. 1769 (2007)(qualified immunity is a fact intensive inquiry and a court should no adopt a view of the facts that is blatantly contradicted by the record). In the absence of any evidence of actual exigency, it is obvious that *Steagald* gave Harvey fair warning that his warrantless entry into the Bates' Home violated the Fourth Amendment.

There are two decisions by other courts of appeal addressing similar searches pursuant to civil process. See, *McCabe v. Life-Line Ambulance Service, Inc., 77 F.3d. 540, (1st Cir. 1996)*(finding civil commitment procedure valid under "special needs" exception to warrant requirement); and *Gates v. Texas Department of Prot. & Reg. Srvs, 2008 U.S. App. LEXIS 15947 (5th Cir. 07/28/08)*(finding no exigent circumstances justifying a warrantless search and concluding that law was clearly established as to exigent circumstances; however, court granted qualified immunity as the law was not clearly established as to "special needs" exception). It is undisputed that Georgia has not adopted a statutory procedure akin to that adopted by Massachusetts. Compare, O.C.G.A. § 37-7-1 et seq *infra.* p. 2 and *McCabe, supra.* In the absence of such procedure, the *Gates* decision strongly supports Bates' position before the Court.

CONCLUSION

For the within and foregoing reasons, D'Anna Bates respectfully requests that the Court grant certiorari to consider whether clearly established law gave Harvey fair warning that warrantless intrusion into the sanctity of the Bates' Home violated the Fourth Amendment.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-10570

FILED
U.S. COURT OF
APPEALS
ELEVENTH CIRCUIT
March 4, 2008
THOMAS K. KAHN

D. C. Docket No. 05-00025-CV-JTC-3

D'ANNA BATES,
GARY BATES,

Plaintiffs-Appellees,

versus

DEPUTY LEE HARVEY,

Defendant-Appellant,

SHERIFF JIMMY THOMAS,

Defendant.

Appeal from the United States District Court
for the Northern District of Georgia

(March 4, 2008)

Before TJOFLAT, HULL and WILSON, Circuit Judges.

WILSON, Circuit Judge:

Lee Harvey, a deputy sheriff with the Pike County, Georgia Sheriff's Department ("Deputy Harvey"), appeals the denial of his motion for summary judgment based on qualified immunity. In her 42 U.S.C. § 1983 suit, Plaintiff D'Anna Bates ("Mrs. Bates") claims that Deputy Harvey falsely arrested her after entering her home without a warrant to search for the subject of a civil commitment order, in violation of the Fourth and Fourteenth Amendments.[1] The district court concluded that Deputy Harvey was not entitled to qualified immunity because Mrs. Bates established that neither consent nor exigent circumstances justified Deputy Harvey's warrantless entry, search, and arrest in her home under then-clearly established law. Although we agree that Deputy Harvey deprived Mrs. Bates of her constitutional rights, we nonetheless conclude that Deputy Harvey is entitled to qualified immunity on Mrs. Bates's false arrest claim because at the time he acted, the law did

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[1] Mrs. Bates and her husband, Gary Bates, were co-plaintiffs in this action. Mrs. Bates presented a number of claims under 42 U.S.C. § 1983 and Georgia state law, including allegations of false arrest on March 21, 2003, and April 2, 2003; excessive force related to her March 21, 2003 arrest; First Amendment retaliation; and malicious prosecution. Gary Bates asserted a claim for loss of consortium under Georgia state law, over which the district court exercised supplementary jurisdiction pursuant to 28 U.S.C. § 1367(a). The district court granted Deputy Harvey's motion for summary judgment on all claims, except the March 21, 2003 false arrest claim. At this stage—an interlocutory appeal of a denial of qualified immunity—neither Mrs. Bates nor Gary Bates appeals the district court's order granting summary judgment with respect to these other claims.

not give a reasonable officer fair and clear warning that a civil commitment order does not present circumstances sufficiently exigent to excuse the warrantless entry and search of an unrelated third party's home. Accordingly, we reverse the district court's denial of Deputy Harvey's motion for summary judgment on qualified immunity grounds and remand this case back to the district court for further proceedings consistent with this opinion.

I. BACKGROUND[2]

On the morning of March 21, 2003, Mark and Wanda Wilson went before the Probate Court of Upson County, Georgia to request a civil commitment order for their 17-year old son, "J.T." They presented the court with a form affidavit supporting their request. By checking off the applicable boxes, the Wilsons alleged in the form affidavit that based on what they both had observed in the preceding 48 hours, J.T. was an alcoholic and drug dependent who required involuntary treatment and "who present[ed] a substantial risk of imminent harm to himself or others as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to himself or to other persons . . . ." DMSJ (Exh. 1 at 1-2).[3] In addition to the form affidavit, Mark Wilson told the court that "his son is a drug abuser [who] will not go to school, work[;] he says he does [not] care about

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[2] Because we review the denial of defendant's motion for summary judgment, we draw the facts from the pleadings, supporting affidavits, and depositions and view them in the light most favorable to the plaintiff. *Montoute v. Carr*, 114 F.3d 181, 182 (11th Cir. 1997).

[3] "DMSJ" refers to Defendant's Motion for Summary Judgment and supporting exhibits.

anything." *Id.* at 5. Wanda Wilson stated that "her son needs help before he hurts himself or someone else." *Id.* The parents' sworn statements were recorded onto the last page of the affidavit, followed by form language stating that, "[t]he condition is so serious that he/she should be examined forthwith at an Emergency Receiving Facility according to law." *Id.* The affidavit set forth the parents' home as the young man's address. Based on the form affidavit, the Probate Court issued a civil commitment order to any peace officer in Upson County to take J.T. into custody and deliver him to West Central Georgia Regional, an emergency receiving facility. The Probate Court's order did not make any finding as to J.T., but simply recited the affidavits on file in the probate office alleging that J.T. presented a substantial risk of imminent harm to himself or others.

Sergeant David Walker ("Sergeant Walker") of the Upson County Sheriff's Office was charged with executing the civil commitment order later that morning. After the Probate Court issued the order, Wanda Wilson verbally informed Sergeant Walker that J.T. might be found at his friend's house, and she gave the officer an address in Pike County, Georgia. Sergeant Walker requested assistance from the Pike County Sheriff's Office, and Deputy Harvey agreed to help execute the commitment order by driving to the address with Sergeant Walker following in his own patrol car. Before heading out to the address, Deputy Harvey reviewed the civil commitment order and the attached form affidavit, which was eventually left in Sergeant Walker's patrol car. Sergeant Walker told Deputy Harvey that they were traveling to the Pike County address because J.T.'s mother believed that her son was spending the night at his friend's house. Both

officers knew they were going to a third party's home to look for J.T.; neither officer attempted to obtain a search warrant.

Shortly after 9 a.m., Mrs. Bates's 14-year-old step-daughter, "S.B.," answered the officers' knock on the back door to the Bates residence. The officers asked S.B. if J.T. was in the house, and she told them that he wasn't.[4] The officers then asked who else was present in the house, and before S.B. could answer, the officers asked if they could come in and search the house. When S.B. responded "I don't know," the officers walked inside. Deputy Harvey and Sergeant Walker immediately proceeded to the hallway where the bedrooms were located and opened the door to the bedroom where Mrs. Bates's 18-year-old step-daughter, "H.B.," was lying in bed. The officers asked H.B. whether J.T. was in the house, and she responded that she didn't know. H.B. testified that the officers then asked if they could look around, to which she replied "something to the effect of I guess so." H.B. Dep. at 7-8. The officers proceeded to another bedroom belonging to Mrs. Bates's 19-year-old son, "C.L.," where they found C.L. and J.T. asleep. The officers woke up the two boys and Sergeant Walker stood by as J.T. dressed. Both young men followed the officers' directions.

From her bathroom, Mrs. Bates heard a male voice she did not recognize shouting, "Is this you? Is this you?" Hearing loud voices and banging, Mrs. Bates came out of her bedroom to investigate. She immediately saw Deputy Harvey standing at C.L.'s

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[4] Although J.T. was indeed present at the Bates home, he testified that he had snuck in through a bedroom window late the night before.

doorway, yelling at C.L. and demanding to know if the license found on a dresser belonged to him. Mrs. Bates demanded to see a search warrant, and Deputy Harvey replied that he had a court order. Mrs. Bates asked to see the order. Rather than produce the civil commitment order, however, Deputy Harvey tried to explain how the commitment order authorized the officers to enter her home. Mrs. Bates insisted that the officers must leave her house immediately if they could not show her a search warrant. Deputy Harvey told Mrs. Bates that Sergeant Walker left the civil commitment order in his patrol car, but neither officer made any attempt to retrieve the order. Deputy Harvey warned Mrs. Bates that he would arrest her for obstruction of justice if she continued to impede the officers' execution of the civil commitment order.

The verbal exchange between Deputy Harvey and Mrs. Bates continued for about a minute, with Mrs. Bates demanding that the officers show her a search warrant or leave her home. Deputy Harvey suddenly approached Mrs. Bates, grabbed her hand, and twisted her arm around to her back until she fell to the floor as he attempted to place her in handcuffs. One handcuff caught onto his watch, forcing Deputy Harvey to release Mrs. Bates, who ran to the bathroom. Before she could close the bathroom door, Deputy Harvey reached Mrs. Bates, grabbed her by the shoulder, spun her around and struck her in the face. Mrs. Bates fell to the floor. Deputy Harvey grabbed Mrs. Bates by her feet and dragged her across the bathroom floor out into the hallway, while she screamed and kicked, trying to escape. While her children stood by watching the scene unfold, Sergeant Walker joined in, putting his knee into Mrs. Bates's back as he and Deputy Harvey pulled her arms in

opposite directions. At this moment Gary Bates entered the front door to find the two officers pinning his wife face-down on the floor.

When the officers saw Gary Bates, they stood up, one on each side of Mrs. Bates, and lifted her from the floor while still holding on to her arms. As they stood, Deputy Harvey glanced out the window and saw J.T. running across the field behind the Bates's home. When Sergeant Walker asked whether Mrs. Bates was under arrest, Deputy Harvey responded, "not at this time. We need to find [J.T.]" Harvey Dep. at 79. Other officers, who were already on their way to the Bates residence in response to Deputy Harvey's earlier call for back up, joined in the search for J.T. Deputy Harvey ordered another officer to remain with Mrs. Bates before dashing out the side door in pursuit of J.T. Sergeant Walker also remained in the home for some time before leaving to participate in the search.

Mrs. Bates slipped the one handcuff, which was not fully clasped, off her wrist. Although the officers remained in the house, Mrs. Bates moved freely about, showered and called her sister for legal advice. Gary Bates asked Sheriff Jimmy Thomas, whom he knew personally, to come to their home and discuss the morning's events. Deputy Harvey and the other officers eventually called off their search and allowed plain clothes officers to continue looking for J.T. Another officer found J.T. a few hours later on a nearby roadway.

After chasing for J.T., Deputy Harvey returned to the Bates residence to effect the arrest of Mrs. Bates for obstruction of justice. Mrs. Bates was speaking with Gary Bates by his truck in the driveway. Upon seeing Deputy Harvey, Mr. and Mrs. Bates ended their

conversation and went inside their home. Deputy Harvey spoke with Sheriff Thomas, telling him that he had probable cause to arrest Mrs. Bates for felony obstruction of justice. Deputy Harvey entered the Bates residence a second time, handcuffed and arrested Mrs. Bates in her living room, and led her out to his patrol car. Deputy Harvey had neither an arrest warrant nor a search warrant. Deputy Harvey transported Mrs. Bates to the Pike County Sheriff's Office, where she was booked and released on bond later that day.[5]

Mrs. Bates subsequently filed an internal affairs complaint against Deputy Harvey. She alleged that she suffered bruises to her face, arms, legs, and feet, and injuries to her iliosacral joint as a result of the incident. After Mrs. Bates refused to allow an internal affairs investigator to interview her three children privately, the investigator dismissed Mrs. Bates's complaint as unsubstantiated.

On March 27, 2003, a Pike County magistrate judge issued a warrant for Mrs. Bates's arrest after Deputy Harvey testified that Mrs. Bates violently kicked him in the groin during the March 21, 2003 incident. Pike County officers arrested Mrs. Bates at her home for aggravated assault on April 2, 2003. The assault charge ultimately was dismissed. The Pike County Grand Jury, however, indicted Mrs. Bates on one count of felony obstruction of a law enforcement officer. *See* Ga. Code Ann. § 16-10-24(b) (2003).[6]

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[5] Pike County Sheriff's Office Records indicate that Mrs. Bates was arrested at 11:53 a.m. and released at 2:00 p.m. on March 21, 2003.

[6] O.C.G.A. § 16-10-24(b) provides: "Whoever knowingly and willfully resists, obstructs, or opposes any law enforcement

Before her felony obstruction trial, Mrs. Bates moved in limine to exclude testimony from Sergeant Walker and Deputy Harvey on the ground that they violated her Fourth and Fourteenth Amendment rights by entering her home without a search warrant, consent, or exigent circumstances. The trial court denied Mrs. Bates's motion in limine, as well as her subsequent motion for a directed verdict. A jury ultimately acquitted Mrs. Bates of the felony obstruction charge.

Following her trial, Mrs. Bates filed a civil rights action, pursuant to 42 U.S.C. § 1983, against Deputy Harvey and Sheriff Thomas alleging, *inter alia*, that Deputy Harvey unlawfully arrested her on March 21, 2003, violating her Fourth Amendment rights.[7] Deputy Harvey claimed entitlement to qualified immunity and moved for summary judgment. The district court granted Deputy Harvey's motion for summary judgment on all claims except the March 21, 2003 false arrest claim. The district court found that Deputy Harvey was not entitled to qualified immunity from this claim because the law was clearly established that he could not enter Mrs. Bates's home and arrest her without a warrant, consent or exigent circumstances, even if he had probable cause. The court found that under clearly established law the facts demonstrated neither consent nor exigent circumstances to justify

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officer . . . in the lawful discharge of his official duties by offering or doing violence to the person of such officer . . . is guilty of a felony . . . ."

[7] On March 17, 2006, the district court ordered, per the parties' stipulation, that Sheriff Thomas be terminated as a defendant; all claims against him were dismissed with prejudice.

Deputy Harvey's warrantless entry.

Deputy Harvey appeals the district court's denial of his motion for summary judgment on several grounds. First, he argues that the state trial court conclusively established his lawful entry into Mrs. Bates's home, and therefore, the *Rooker-Feldman* doctrine and issue preclusion prohibited the district court from addressing the issues of consent and probable cause underlying Mrs. Bates's Fourth Amendment challenge. Second, Deputy Harvey argues that consent or exigent circumstances justified his warrantless search and seizure. Finally, Deputy Harvey argues that even if he did violate Mrs. Bates's Fourth Amendment rights, he is nonetheless entitled to qualified immunity because the law was not clearly established that the averments made in the civil commitment order did not present sufficiently exigent circumstances to allow an exception to the warrant requirement for homes.

II. STANDARD OF REVIEW

The district court's denial of a motion for summary judgment on the basis of a qualified immunity defense is an immediately appealable final decision for which we have interlocutory jurisdiction under 28 U.S.C. § 1291, so long as the appeal involves a question of law. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817 (1985); *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1303 (11th Cir. 2006), *cert. denied*, — U.S. —, 127 S. Ct. 2428 (2007). Whether qualified immunity shields an official from suit is a question of law. *Bennett v. Parker*, 898 F.2d 1530, 1532 (11th Cir. 1990). We therefore review the district court's denial of a motion for summary

judgment on the basis of qualified immunity *de novo*, viewing the facts in the light most favorable to the non-moving party. *Kesinger ex rel. Estate of Kesinger v. Herrington*, 381 F.3d 1243, 1247 (11th Cir. 2004). With the facts so construed, we have "the plaintiff's best case in hand," and therefore, "material issues of disputed fact are not a factor in the court's analysis of qualified immunity and cannot foreclose the grant or denial of summary judgment based on qualified immunity . . . ." *Robinson v. Arrugueta*, 415 F.3d 1252, 1257 (11th Cir. 2005), *cert. denied*, 546 U.S. 1109, 126 S. Ct. 1063, 163 L. Ed. 2d 887 (2006). Thus, we determine the legal issue of whether the defendant was entitled to qualified immunity using the version of facts most favorable to the plaintiff. *Durruthy v. Pastor*, 351 F.3d 1080, 1084 (11th Cir. 2003).

III. DISCUSSION

A. *Nature of the Claim*

In the district court Mrs. Bates asserted several claims, but on appeal her only claim is that she was unlawfully arrested, in violation of the Fourth Amendment, for felony obstruction of a law enforcement officer. "In Fourth Amendment terminology, an arrest is a seizure of the person, and the 'reasonableness' of an arrest is, in turn, determined by the presence or absence of probable cause for the arrest." *Skop v. City of Atlanta*, 485 F.3d 1130, 1137 (11th Cir. 2007) (citation omitted). Thus, to establish a constitutional violation in a §1983 false arrest claim, the plaintiff ordinarily must prove that the officer arrested her without at least arguable probable cause to believe she had committed or was committing a crime. *Id.* However, where we have an arrest, like Mrs.

Bates's, that (1) occurs within the arrested person's home and (2) is not accompanied by either an arrest or search warrant, the plaintiff must prove that the officer's presence in the her home was unlawful to establish a constitutional violation.

Because "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," it is "a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 585–86, 100 S.Ct. 1371, 1379–80, 63 L. Ed. 2d 369 (1980) (quotation marks and citations omitted). The presumption is rebutted, and the arrest lawful, only when some exception to the warrant requirement—such as consent or exigent circumstances—exists. *See Kirk v. Louisiana*, 536 U.S. 635, 635, 122 S. Ct. 2458, 2458, 153 L. Ed. 2d 599 (2002); *Bashir v. Rockdale County*, 445 F.3d 1323, 1327–28 (11th Cir. 2006); *United States v. McGough*, 412 F.3d 1232, 1236–37 (11th Cir. 2005).

The rule that in-home arrests violate the Fourth Amendment unless they are accompanied by a warrant or an exception to the warrant requirement applies "even when [the arrest] is accomplished under statutory authority and when probable cause is clearly present." *Payton*, 445 U.S. at 589, 100 S. Ct. at 1381; *accord Bashir*, 445 F.3d at 1328 ("Although the district court ruled the officers had probable cause to arrest Bashir for disorderly conduct, a ruling Bashir has not challenged on appeal, the existence of probable cause does not by itself validate a warrantless home arrest."). Thus, to obtain qualified immunity from Mrs. Bates's false arrest claim, Deputy Harvey must demonstrate

that his presence in the Bates home without a warrant was lawful or did not violate then-clearly established law. Accordingly, despite the fact that Mrs. Bates's claim is for wrongful *arrest*, much of our analysis concerns the legality of the officers' initial *entry* into her home, because the effectuation of her arrest was a continuation of the initial search and seizure.[8]

B. *The* Rooker-Feldman *Doctrine and Issue Preclusion*

Congress has vested the review of final judgments by a state's highest court within the sole jurisdiction of the U.S. Supreme Court. 28 U.S.C. § 1257. The *Rooker-Feldman* doctrine acknowledges the Supreme Court's exclusive jurisdiction in this respect by "prevent[ing] lower federal courts from exercising jurisdiction over cases brought by 'state-court losers' challenging 'state-court judgments rendered before the district court proceedings commenced.'" *Lance v.Dennis*, 546 U.S. 459, 460, 126 S. Ct. 1198, 1199, 163 L. Ed. 2d 1059 (2006) (per curiam) (quoting *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 1521–22, 161 L. Ed. 2d 454 (2005)); *see also Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923) (holding that

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[8] Upon his initial entry into and search of the Bates home, Deputy Harvey verbally expressed his intent to arrest Mrs. Bates after finding J.T. and ordered other officers to remain with her until his return. Under all the particular factual circumstances of this case, we decline Deputy Harvey's request to analyze his conduct as two separate incidents, marked by two separate entries, especially given that, among other factors, a reasonable person in Mrs. Bates's position would not have believed she was free to leave or terminate the encounter with the officers.

lower federal courts could not entertain a proceeding to review substantive constitutional questions decided in a state court judgment); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983) (holding that Article III of the Constitution mandates that a claim of right denied by a judicial order of a state court may only be reviewed by the Supreme Court when federal questions are raised). The *Rooker-Feldman* doctrine is distinct from issue preclusion, formerly "collateral estoppel," although the two principles are closely related. *Agripost, Inc. v. Miami-Dade County, ex rel. Manager*, 195 F.3d 1225, 1229 n.7 (11th Cir. 1999); *see also Lance*, 546 U.S. at 466, 126 S. Ct.
at 1202.

While the *Rooker-Feldman* doctrine pertains to the subject-matter jurisdiction of the federal courts, issue preclusion relates to the question of when a federal court may decline to hear a matter of dispute within its jurisdiction. As to the latter inquiry, issue preclusion bars identical parties to a proceeding from relitigating issues that were adjudicated in the former proceeding. A court may give preclusive effect to a matter in dispute only when (1) that issue is identical to an issue decided in an earlier proceeding; (2) the issue was actually litigated on the merits; (3) the issue was decided in the earlier proceeding, meaning "the prior determination of the issue must have been a critical and necessary part of the judgment in that earlier decision"; and (4) the burden of proof in the earlier proceeding is at least as stringent as the burden of proof in the current proceeding. *In re Southeast Banking Corp.*, 69 F.3d 1539, 1552 (11th Cir. 1995). Moreover, the party against whom issue preclusion is being sought must have had a "full and fair

opportunity" to litigate the issue in the prior proceeding. *Winegard v. Emerald Venture Florida LLC*, 438 F.3d 1288, 1293 (11th Cir. 2006).

Deputy Harvey claims that by denying Mrs. Bates's motions in limine to exclude the officers' testimony and for a directed verdict in her felony obstruction trial, the Georgia trial court necessarily decided that the officers lawfully entered Mrs. Bates's house and had probable cause to arrest her, and the district court thus should have held that the *Rooker-Feldman* doctrine and issue preclusion bar Mrs. Bates from re-litigating those issues. We reject this argument.

The *Rooker-Feldman* doctrine "is confined to cases . . . brought by state court losers complaining of injuries caused by state-court judgments . . . ." *Exxon Mobil*, 544 U.S. at 284, 125 S. Ct. at 1521–22. The doctrine's jurisdictional bar does not extend to "federal actions that simply raise claims previously litigated in state court." *Id.* at 287 n.2, 125 S. Ct. at 1524 n.2. Mrs. Bates is not a "state-court loser"; nor does she complain of an injury caused by a state-court judgment. Not only was she acquitted in her felony obstruction trial, but the state court trial transcript reveals that the state court never held, either expressly or by fair inference, that the officers had consent to enter the Bates home, that their entry was otherwise lawful, or that they had probable cause to arrest Mrs. Bates. The *Rooker-Feldman* doctrine does not apply.

Similarly, Mrs. Bates is not precluded from re-litigating the issues of consent or probable cause. In denying Mrs. Bates's motion in limine, the state court merely opted to rule on contemporaneous objections to

proffered evidence. With respect to Mrs. Bates's directed verdict motion, the state court simply allowed the jury to decide whether Mrs. Bates violated Georgia's felony obstruction statute.[9] There was no finding by either the state court or the jury as to whether the officers lawfully entered the Bates home or had probable cause at the time they arrested Mrs. Bates. Because the questions of lawful entry and probable cause were not actually litigated and decided, issue preclusion is inapplicable.

C. *Qualified Immunity*

Under 42 U.S.C. § 1983, an aggrieved party may seek a remedy against government officials for the violation of her constitutional rights in a suit for damages.[10] *Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 1696, 143 L. Ed. 19 2d 818 (1999); *see also Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 690–91, 98 S. Ct. 2018, 2035–36, 56 L. Ed. 2d 611 (1978) (extending liability under § 1983 to municipalities and other local governmental units for their deprivation of constitutional rights). Section 1983 is a particularly important tool for redressing constitutional violations because, in many situations,

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[9] *See supra* note 6.

[10] 42 U.S.C. § 1983 provides, in relevant part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

"an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 102 S. Ct. 2727, 2736, 73 L. Ed. 2d 396 (1982).

Qualified immunity protects law enforcement officials from § 1983 suits for civil damages arising from the discharge of their discretionary functions, "as long as their actions could *reasonably* have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987) (emphasis added). Qualified immunity proceeds from the concern that "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Id.* For this reason, qualified immunity is a privilege that provides "'an *immunity from suit* rather than a mere defense to liability.'" *Saucier v. Katz*, 533 U.S. 194, 200–01, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). Qualified immunity affords "protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271 (1986). To preserve this immunity from suit at the earliest stages of litigation, *Saucier* "instructs that '[i]f the law did not put the officer *on notice* that his conduct would be *clearly* unlawful, summary judgment based on qualified immunity is appropriate.'" *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (quoting *Saucier*, 533 U.S. at 202, 121 S. Ct. at 2156–57).

A plaintiff who seeks to avoid summary judgment on the basis of qualified immunity must show not only that the officer violated her federal constitutional or statutory rights, but also that those rights were clearly established at the time the officer acted. *See Wilson*, 526 U.S. at 609, 119 S. Ct. at 1697. Under qualified immunity's shifting burden of proof, an officer must first "prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Estate of Kesinger*, 381 F.3d at 1248. Once the officer has satisfied his burden, "the burden then shifts to the plaintiff to establish that qualified immunity is not appropriate." *Id.* Qualified immunity is not appropriate where the officer's actions were objectively unreasonable: that is, under the facts and circumstances known to the officer at the time, his actions violated clearly established law.

As noted earlier, Mrs. Bates's suit arises out of Deputy Harvey's attempt to help Sergeant Walker execute a civil commitment order. Thus, the district court correctly determined that Deputy Harvey was exercising discretionary authority as an officer with the Pike County Sheriff's Office. We now address whether Mrs. Bates can avoid summary judgment on the basis of qualified immunity.

1. *Unlawful Arrest: Constitutional Violation*

We begin our qualified immunity analysis by examining "whether plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736, 122 S. Ct. 2508, 2513, 153 L. Ed. 2d 666. Mrs. Bates alleges that on March 21, 2003, Deputy Harvey violated her Fourth Amendment rights by entering her home illegally—without a warrant, valid

consent, or exigent circumstances—to search for J.T. and subsequently arresting her in her home after she verbally protested his unlawful presence.

The Fourth Amendment, incorporated to the States by the Fourteenth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The "centuries-old principle of respect for the privacy of the home" is the fountainhead of our Fourth Amendment protections. *Wilson*, 526 U.S. at 610, 119 S. Ct. at 1697. The warrant requirement guards this privacy and minimizes the danger of unnecessary "physical entry of the home." *Payton*, 445 U.S. at 585–86, 100 S. Ct. at 1379–80. It is a fundamental rule of Fourth Amendment law that warrantless searches and seizures inside a home are presumptively unreasonable. *Id.* at 586, 100 S. Ct. at 1380.

Although the Fourth Amendment shields one's home from unwanted and warrantless intrusions by law enforcement officers, "the ultimate touchstone of the Fourth Amendment is 'reasonableness,' [and thus,] the warrant requirement is subject to certain exceptions." *Brigham City, Utah v. Stuart*, 547 U.S. 398, —, 126 S. Ct. 1943, 1947, 164 L. Ed. 2d 650 (2006). Two "specifically established and well-delineated

exceptions" are warrantless searches made pursuant to consent or under exigent circumstances. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576 (1967). Specifically, a warrantless search does not violate the Fourth Amendment where there is voluntary consent given by a person with authority. *Illinois v. Rodriguez*, 497 U.S. 177, 181, 100 S. Ct. 2793, 2797, 111 L. Ed. 2d 148 (1990). Similarly, a warrant is not required where "'the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.'" *Stuart*, 126 S. Ct. at 1947 (internal quotation marks omitted) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393–94, 98 S. Ct. 2408, 2414, 57 L. Ed. 2d 290 (1978)). Deputy Harvey does not dispute that he entered Mrs. Bates's home to search for J.T. without a search warrant. However, Deputy Harvey argues that he did not violate Mrs. Bates's Fourth Amendment rights because both consent and exigent circumstances justified his warrantless entry. We address each argument in turn.[11]

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[11] Deputy Harvey also argues that because Mrs. Bates was on probation at the time of the incident, she had no right against warrantless arrest in her home. He cites *United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001), in support of this proposition.

Contrary to Deputy Harvey's contention, "[a] probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be 'reasonable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 3168, 97 L. Ed. 2d 709 (1987). In *Knights*, the Supreme Court held that a warrantless search of a probationer's home is reasonable under the Fourth Amendment where the search is made pursuant to an *express waiver* of one's Fourth Amendment rights as a condition of probation and supported by reasonable suspicion. 534 U.S. at 122, 122 S. Ct. at 593. Here, Mrs. Bates

a. Consent

Deputy Harvey argues that H.B., who was then 18 years old, invoked her authority as a resident and voluntarily consented to the officers' search for J.T. shortly after they entered the Bates residence. Mrs. Bates counters that H.B. did not give the officers consent.

For a warrantless search to be constitutionally valid on the basis of consent, that consent must be given voluntarily by an individual possessing "common authority" over the premises. *Rodriguez*, 497 U.S. at 181, 100 S. Ct. at 2727. Common authority "rests . . . on mutual use of the property by persons generally having joint access or control for most purposes," and is not implicated by a mere property interest alone. *United States v. Matlock*, 415 U.S. 164, 172, n.7, 94 S. Ct. 988, 993 n.7, 39 L. Ed. 2d 242 (1974). Consent is voluntary when it is "'the product of an essentially free and unconstrained choice.'" *United States v. Gonzales*, 71 F.3d 819, 829 (11th Cir. 1996) (quoting *United States v. Garcia*, 890 F.2d 355, 360 (11th Cir. 1989)). We have found that meaningful consent cannot be derived from the mere failure to object to a search, and

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does not contest that she was on probation, but there is no evidence in the record indicating that consent to warrantless searches and seizures in her home was a condition of her probation. Nor is there any evidence that Deputy Harvey or Sergeant Walker had any reasonable grounds to believe, before entering Mrs. Bates's home, that she had contraband or was engaged in criminal activity there. We therefore reject Deputy Harvey's argument that Mrs. Bates lacked a reasonable expectation of privacy in her home.

that "whatever relevance the implied consent doctrine may have in other contexts, it is inappropriate to 'sanction[ ] entry into the home based upon inferred consent.'" *Id.* (quoting *United States v. Shaibu*, 920 F.2d 1423, 1426 (9th Cir. 1990)).

The parties dispute whether H.B. actually consented to the search. At Mrs. Bates's felony obstruction trial, neither Deputy Harvey nor Sergeant Walker testified that H.B. was asked for or had given them consent to search; they both testified only that they asked H.B. whether J.T. was in the house and that she indicated he was not. Deputy Harvey, in fact, testified that H.B. said no words to him at all, but just shook her head when he asked about J.T. H.B., though, testified at her deposition that the officers entered her bedroom and asked her if it was alright to look around, and that she replied "something to the effect of I guess so." H.B. Dep. at 7-8. Even if accepted, H.B.'s response is, at best, an equivocal answer, and we cannot imply consent from her failure to object to the officers' search. Construing the facts in favor of Mrs. Bates at the summary judgment stage, we agree with the district court that Deputy Harvey did not have consent to enter and search Mrs. Bates's home.

b. Exigent Circumstances

Deputy Harvey also argues that exigent circumstances justified his warrantless entry into the Bates residence. He claims that he relied on the civil commitment order, which included Mark and Wanda Wilson's averments that J.T. "present[ed] a substantial risk of serious harm to himself or others as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical

injury to himself or to other persons." According to Deputy Harvey, these statements demonstrated a danger to persons inside the Bates residence and created sufficiently exigent circumstances. He also argues that J.T.'s confirmed presence in the home created a risk of flight, another form of exigent circumstance. Mrs. Bates claims that because Deputy Harvey did not know if J.T. was in the house when he first entered, he had no fear of imminent danger, flight, or any other exigency to justify his warrantless entry and search, notwithstanding the civil commitment order. She argues that the evidence clearly shows that the officers were in no particular haste in executing the order and did not treat it as an emergency.

In *Payton*, the Supreme Court laid down the firm rule that unless exigent circumstances are present, the threshold to the entrance of the home "may not reasonably be crossed without a warrant." 445 U.S. at 590, 100 S. Ct. at 1382. As the Court has explained, the purpose of this rule "was not to protect the person of the suspect but to protect his home from entry in the absence of a magistrate's finding of probable cause." *Minnesota v. Olsen*, 495 U.S. 91, 95, 110 S. Ct. 1684, 1687, 109 L. Ed. 2d. 85 (1990). The Court later extended the *Payton* rule, so that absent exigent circumstances, law enforcement officers may not enter the home of a third party to search for the subject of an arrest warrant without first securing a search warrant for that home. *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).[12] The court reasoned that an arrest warrant

[12] Thus, *Payton* holds that officer lacking consent, exigent circumstances, or a search warrant can, with an arrest warrant, lawfully enter the home of the subject of the arrest warrant.

alone was insufficient because "[a]rmed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances." *Id.* at 215, 101 S. Ct. at 1649. The Court was concerned that "[a] contrary conclusion . . . would create a significant potential for abuse." *Id.*

The police thus bear a heavy burden of proving that the exigent circumstances exception validates a warrantless entry or search of a third party's home to look for a non-resident. *Welsh*, 466 U.S. at 749–50, 104 S. Ct. at 2097; *Vale v. Louisiana*, 399 U.S. 30, 34, 90 S. Ct. 1969, 1972, 26 L. Ed. 2d 409 (1970)). The government meets that burden by demonstrating the existence of both probable cause and exigency. *United States v. Holloway*, 290 F.3d 1331, 1337 (11th Cir. 2002). Where the exigency is an emergency, "probable cause exists where law enforcement officials 'reasonably believe' that someone is in danger." *United States v. Davis*, 313 F.3d 1300, 1302 (11th Cir. 2002) (per curiam). Based on the averments in the civil commitment order, Deputy Harvey had probable cause to believe that J.T. was in danger. The question remains, however, whether Deputy Harvey faced sufficiently exigent circumstances to justify his warrantless entry and search of Mrs. Bates's home.

The *Payton* Court "ha[d] no occasion to consider the sort of emergency or dangerous situation, described

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Payton, 445 U.S. at 602–03, 100 S. Ct. at 1388. But under *Steagald*, an arrest warrant is not enough to permit lawful entry into a third party's home. *Steagald*, 451 U.S. at 205–06, 101 S. Ct. at 1644. Neither *Payton* nor *Steagald* addresses whether a civil commitment order may authorize entry into a home—either that of the subject of the order or someone else's.

in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." 445 U.S. at 583, 100 S. Ct. at 1378. Since *Payton*, however, both the Supreme Court and this court have addressed the question of what constitutes exigent circumstances.

The exigent circumstances exception to the warrant requirement is based on the understanding that in some situations, "a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant." *Michigan v. Tyler*, 436 U.S. 499, 509, 98 S. Ct. 1942, 1949, 56 L. Ed. 2d 486 (1978). Thus, we will excuse a warrantless entry into the home "when probable cause exists, if 'exigent circumstances' make it impossible or impracticable to obtain a warrant." *United States v. McGregor*, 31 F.3d 1067, 1068–69 (11th Cir. 1994). This encompasses situations such as hot pursuit of a suspect, risk of removal or destruction of evidence, and danger to the arresting officers or the public." *United States v. Edmondson*, 791 F.2d 1512, 29 1515 (11th Cir. 1986). We have found situations to be sufficiently exigent "where there is danger to human life." *Holloway*, 290 F.3d at 1334. "[T]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." *Id.* at 1336. Accordingly, "police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury." *Stuart*, 126 S. Ct. at 1946.

We agree with the district court that Deputy Harvey failed to demonstrate circumstances

sufficiently exigent to justify his warrantless entry into Mrs. Bates's home. Deputy Harvey read the civil commitment order and was therefore aware of the averments in the form affidavit that J.T. presented a substantial risk of immediate harm to himself or others. Yet, the affidavit stated that J.T. resided at a different address. The affidavit and the order did not state that J.T. might be found at the Bates home. All Sergeant Walker knew, and all that Sergeant Walker told Deputy Harvey, was that J.T.'s mother said that her son might be spending the night at a friend's house, which was in a different county. As the district court properly noted, when the officers arrived at the home, Deputy Harvey first asked S.B., and later H.B., if J.T. was inside, further demonstrating his lack of knowledge as to whether J.T. was in the home. More importantly, at the door, S.B. said that J.T. wasn't there.[13] Even after the officers went inside, H.B. told them she didn't know if J.T. was present. Finally, Deputy Harvey's own testimony indicates that he knew nothing about Mrs. Bates or anyone else inside

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[13] Deputy Harvey contends that S.B. told him that she didn't know if J.T. was at the house, but that she also told him that C.L. and J.T. had been out together the previous night, and that C.L. drove a red pickup truck, which Deputy Harvey saw parked in the Bates driveway. However, Sergeant Walker testified that he did not remember any mention of a red pickup truck, and S.B.'s testimony contradicts Deputy Harvey's version of events: she testified that she told the officers that J.T. was not there, that they then asked her who else was there, and that before she could finish answering they asked if they could enter the house and, despite her saying she didn't know, they then entered and began searching for J.T. The facts, viewed most favorably to Mrs. Bates, thus indicate that S.B. denied that J.T. was in the house and made no mention of C.L., his truck, or the activities of the night before.

the Bates residence.[14]

Based on these facts, we conclude that after being advised J.T. was not there, Deputy Harvey did not have an objectively reasonable basis for believing that there was an occupant in the Bates home who was a danger to himself or others such that it was impossible or impracticable to obtain a search warrant before barging into a third party's home to execute a civil commitment order for a person not related to the residents there and known to reside at a different address. We recognize that Wanda Wilson verbally stated that J.T. may have been spending the night there, but she also stated in the civil commitment affidavit that J.T. resided elsewhere, and at the door of the Bates home, S.B. said that J.T. was not there. Contrary to Deputy Harvey's contentions, a civil commitment order for a mentally ill or substance-dependent person does not, standing alone, provide law enforcement officers with a mandate to enter and search the home of every third party friend or

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[14] Deputy Harvey's near-total lack of information regarding the situation inside the Bates home (including, specifically, whether J.T. was present there) and S.B.'s statement at the door that J.T. was not there distinguishes this case from the exigent circumstances present in *Stuart* and *Holloway*. *See Stuart*, 126 S. Ct. at 1949 (officers called to home by noise complaints heard sounds of a fight coming from within and, upon further investigation, saw several individuals fighting inside); *Holloway*, 290 F.3d at 1338 (officers received dispatches of 911 calls reporting sounds of arguing and gunshots coming from inside home). We also stress that, because Deputy Harvey was attempting to serve the civil commitment order at the home of an unrelated third party, Deputy Harvey could not have had an objectively reasonable basis for inferring that J.T. might be present merely from the fact that it was J.T.'s own home.

acquaintance of that person, especially when a resident at the door of the home says the person is not there. Such a result flies in the face of objective reasonableness and would result in the most abusive intrusions into the most highly guarded sphere under the Fourth Amendment: the home. Nor did Deputy Harvey face exigent circumstances once he located J.T. in the home. Deputy Harvey admits that J.T. was fully cooperating with the officers and that he perceived no threat of imminent danger to himself or anyone else, until he commenced the scuffle with Mrs. Bates.[15]

Because Deputy Harvey did not have consent nor face sufficiently exigent circumstances to justify his warrantless entry, search and arrest in Mrs. Bates home, he violated Mrs. Bates's constitutional rights under the Fourth and Fourteenth Amendments.[16] We

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[15] Thus, as in *Bashir*, "this is not a situation where exigent circumstances arose after an unlawful entry." 445 F.3d at 1328 n.6.

[16] In the district court and now on appeal, Deputy Harvey also claims that the "special needs" exception to the warrant requirement justified his entry into Mrs. Bates's home. The special needs exception applies to warrantless searches conducted pursuant to a governmental policy or procedure aimed to achieve some non-law-enforcement administrative or regulatory purpose that would be frustrated by application of the warrant requirement. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386 (1995) (school policy authorizing random urinalysis drug testing of student athletes); *Nat'l Treas. Employees Union v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384 (1989) (drug-testing program requiring urinalysis test of employees); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 109 S. Ct. 1402 (1989) (regulations mandating drug and alcohol testing of employees involved in certain train accidents); *Griffin v. Wisconsin*, 483 U.S. 868, 107 S. Ct. 3164 (1987) (state regulations permitting probation officers to search a probationer's home if there are reasonable grounds to believe

now turn to whether those rights were clearly established at the time Deputy Harvey acted.

2. *Unlawful Arrest: Clearly Established Law*

For a constitutional right to be "clearly established" the "contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Creighton*, 483 U.S. at 640, 107 S. Ct. at 3039. A plaintiff need not show that the officer's conduct specifically has been held unlawful. Rather, to avoid having her suit barred by qualified immunity, a plaintiff need only show that "in the light of pre-existing law the unlawfulness [was] apparent." *Id.*

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contraband is present).

In this case there is no evidence of any governmental policy or procedure about warrantless entry into homes of third parties who are not the subject of the civil commitment order. Indeed, at Mrs. Bates's felony obstruction trial, Deputy Harvey was asked whether there was any "particular procedure in place" for serving civil commitment orders, and he indicated that there was no procedure other than "just treating people with courtesy and respect and being polite with them." R.47-10 at 8. Deputy Harvey further testified that he did not believe that the civil commitment order authorized him to enter the Bates home without consent. R.47-12 at 43. Thus, we need not decide whether a special needs exception could apply to certain civil commitment orders. *Cf. McCabe v. Life-Line Ambulance Serv., Inc.*, 77 F.3d 540, 545 (1st Cir. 1996) (upholding city policy permitting warrantless entry of homes to execute involuntary civil commitment orders issued upon an expert medical finding of a likelihood of serious harm, and stating that "a residential search pursuant to an established warrantless search *procedure* may be reasonable if conducted in furtherance of an important administrative or regulatory purpose, or 'special need,' which would be undermined *systematically* by an impracticable warrant or probable-cause requirement").

Thus, the "salient question" for our clearly established analysis is whether the state of the law at the time the officers acted gave them "fair warning" that their conduct was unconstitutional. *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516.

We have identified three ways in which the law can give an officer "fair and clear notice" that his conduct is unconstitutional. First, the constitutional provision in question "will be specific enough to establish clearly the law applicable to particular conduct and circumstances." *Vinyard*, 311 F.3d at 1350. Where, however, "the conduct is not so egregious as to violate, for example, the Fourth Amendment on its face, we then *turn to case law*."[17] *Id.* at 1351. Under this second method of providing fair and clear notice, a broad principle found in the case law can "establish clearly the law applicable to a specific set of facts facing a government official" when the principle is set forth "'with obvious clarity' to the point that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted." *Id.* As a third method, "if we have no case law with a broad holding . . . that is not tied to particularized facts, we then look at precedent *that is tied to the facts*." *Id.*

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[17] In our qualified immunity analysis, "decisions of the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state . . . can clearly establish the law." *McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. 2007); *see also Marsh v. Butler County*, 268 F.3d 1014, 1032, n.10 (11th Cir. 2001) (en banc). The applicable state case law in this case is from the Supreme Court of Georgia.

We have found that "[o]ne of the most compelling events giving rise to exigent circumstances is the occurrence of an emergency situation." *Holloway*, 290 F.3d at 1335. "The most urgent emergency situation excusing police compliance with the warrant requirement is, of course, the need to protect or preserve life." *Id.* (citing *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 2413, 57 L. Ed. 2d 290 (1978)). In *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782, the Court found the warrantless entry of a third party's home to be reasonable where the police were in pursuit of an armed robbery suspect who was seen fleeing into the third party's home within minutes of the robbery. *Id.* at 298, 87 S. Ct. at 1645–46. In concluding that the "Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others," the Court found that speed was essential under the circumstances the officers faced, and that only a complete search of the home would have secured the suspect and any possible weapons. *Id.* at 298–99, 87 S. Ct. at 1646.

We have previously addressed the question of whether a situation presents a danger to human life so as to fall within the exigent circumstances exception. In *Holloway*, we upheld the warrantless entry and search of appellant's home by police officers responding to 911 calls reporting gunshots and loud arguing at appellant's address. 290 F.3d 1338. The officers immediately proceeded to the residence upon the first dispatch and received a second dispatch indicating repeated gunshots and arguing on the way to the home. *Id.* Once at the scene, nothing dissuaded the officers from believing the veracity of the 911 calls. *Id.* Rather, the officers' observations upon arrival at the

residence supported the information conveyed by the 911 caller. *Id.* We noted that, under the circumstances known to them, the officers reasonably believed an emergency situation existed. *Id.* We found that based on the calls and the officers' observations at the scene, the officers had probable cause to believe that someone inside the residence was in danger and were justified in entering the home to search for victims. *Id.* We held that these circumstances were sufficiently exigent and did not require the officers to obtain a warrant before entering the appellant's home. *Id.*

Because our clearly established inquiry centers on objective reasonableness, we have to examine how a reasonable officer in Deputy Harvey's position on March 21, 2003, would have interpreted and responded to the civil commitment order in light of then-clearly established law. Fourth Amendment law clearly established that the nonconsensual warrantless entry and search of a third party's home is per se unreasonable absent exigent circumstances. *See Steagald*, 451 U.S. 204. Under then-clearly established law, however, the contours of the Fourth Amendment were not sufficiently clear so as to give a reasonable officer fair and clear notice that the civil commitment order in this case did not invoke the exigent circumstances exception to the warrant requirement as to Mrs. Bates's home. Deputy Harvey was presented with an order by a state court judge that said that a young man needed to be picked up and placed in custody because he presented a danger to himself and to others. A reasonable officer could have interpreted these averments as indicating a life or death emergency and felt compelled to execute the order with the speed and immediate attention applicable in an emergency situation. In this case, the civil commitment

order was effectuated on the same day it was issued, providing support to Deputy Harvey's argument that a reasonable officer would think this was an emergency situation. Therefore, we find that Deputy Harvey is entitled to qualified immunity.

IV. CONCLUSION

Deputy Harvey's initial warrantless entry and search of Mrs. Bates's home was presumptively unreasonable and not justified by either the consent or exigent circumstances exceptions to the Fourth Amendment warrant requirement. Therefore, his subsequent seizure and arrest of Mrs. Bates was unlawful, in violation of her constitutional rights under the Fourth and Fourteenth Amendments. Nevertheless, we are constrained to conclude that a reasonable officer could have believed, at the time Deputy Harvey acted, that the averments in the civil commitment order about a person presenting a substantial imminent threat of danger to himself or others presented a sufficiently emergent situation, justifying the warrantless entry and search of a third party's home for that person. Because the contours of the exigent circumstances exception were not sufficiently clear, prior to this case, to give a reasonable officer fair and clear warning that a warrantless entry and search such as this one was not justified, Deputy Harvey is entitled to qualified immunity. We therefore reverse the district court's denial of Deputy Harvey's motion for summary judgment based on qualified immunity and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
May 06, 2008
THOMAS K. KAHN
CLERK

No. 07-10570-GG

D'ANNA BATES,
GARY BATES,

Plaintiffs-Appellees,

versus

DEPUTY LEE HARVEY,

Defendant-Appellant,

SHERIFF JIMMY THOMAS,

Defendant.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, HULL and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Charles Wilson
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

D'ANNA BATES and GARY BATES,	:	
Plaintiffs,	:	CIVIL CASE NO.
v.	:	3:05-CV-00025-JTC
DEPUTY LEE HARVEY,	:	
Defendant.	:	

ORDER

This matter is currently before the Court on Defendant's motion for summary judgment [#36]. Plaintiffs bring claims under 42 U.S.C. § 1983, as well as a claim under the laws of Georgia. For the following reasons, Defendant's motion is **GRANTED in part** and **DENIED in part**.

I. Factual Background[1]

On March 21, 2003, the Probate Court of Upson County, Georgia, after receiving an affidavit from Mark and Wanda Wilson, issued a civil commitment order directing the law enforcement officer charged with its execution to find their son, Tyler Wilson ("Tyler"), and bring him to Georgia Regional Hospital for a psychological evaluation. (DSMF ¶¶

[1] Except where indicated, the facts in this section are taken from the undisputed evidence in the record. The Court construes them in the light most favorable to Plaintiffs, the nonmovants.

1-2.)[2] Later that same morning, Sergeant David Walker of the Upson County Sheriff's Office, the officer charged with serving the commitment order, learned from Wanda Wilson that Tyler could be found at an address in Pike County. (Id. ¶ 3.) Sergeant Walker met with Defendant, a Pike County Deputy Sheriff, who agreed to assist Walker in serving the commitment order. (Id. ¶¶ 3, 5.) The officers drove to the address provided by Wanda Wilson, which was Plaintiffs' home in Pike County. (Id. ¶ 6.) Plaintiffs resided at the house with Christopher Laughery ("Chris"), D'Anna Bates's nineteen-year-old son from a prior marriage, and Sarah and Hannah Bates, Gary Bates's sixteen- and twenty-year-old daughters from a prior marriage. (PSMF ¶¶ 1-5.)

Sarah Bates answered Sergeant Walker's and Defendant's knock at the kitchen door. (DSMF ¶ 10; PSMF ¶ 26.) Defendant asked Sarah if Tyler was in the house, and Sarah responded that she did not know. (DSMF ¶ 11;PSMF ¶¶ 28-29.) Defendant then requested permission to enter the house and look for Tyler, and Sarah again responded, "I don't know."[3] (DSMF ¶ 13;PSMF ¶¶ 30, 32; Def.'s Summ. J. Mot., Exh. F at 182.) The officers entered the home and proceeded to Hannah's room, where they encountered Hannah, who told them that Tyler was not there.[4] (DSMF ¶ 15; PSMF ¶¶ 38-39; Def.'s Summ. J. Mot., Exh. F at 182.) The officers then knocked on another bedroom door and opened it to find Chris and Tyler sleeping inside. (DSMF ¶

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[2] Paragraph numbers preceded by "DSMF" refer to paragraphs in "Defendant Harvey's Statement of Material Facts." Paragraph numbers preceded by "PSMF" refer to paragraphs in "Plaintiffs' Statement of Material Facts."

[3] Defendant asserts that Sarah gave consent for him and Sergeant Walker to search the house for Tyler. (DSMF ¶ 13; Def.'s Summ. J. Mot., Exh. F at 16, 147.)

[4] Defendant asserts that Hannah provided additional consent to search the house for Tyler. (DSMF ¶ 15; Hannah Dep. at 7-8, 12-13.)

16; PSMF ¶ 40.) The officers woke Chris and Tyler, identified Tyler, told him to get dressed, and explained that he would have to go with them based on the commitment order. (DSMF ¶ 16.) In this process, enough noise was created, possibly due to Defendant's questioning Chris regarding a driver's license on a dresser, to cause Plaintiff D'Anna Bates ("D'Anna") to leave her bedroom and proceed to the doorway of Chris's bedroom. (DSMF ¶¶ 17-19; PSMF ¶¶ 41-43.) When D'Anna arrived at the bedroom door, Defendant was approximately five feet from the door, and Sergeant Walker was approximately eight feet from the door and standing next to Tyler. (DSMF ¶ 20; PSMF ¶¶ 44-45.)

What happened next is the subject of significant dispute between the parties. In an apparently heated exchange, D'Anna repeatedly demanded that the officers either show her a warrant or leave the house. (DSMF ¶¶ 19-23; PSMF ¶¶ 46-48.) Defendant indicated that he had a court order, but never produced a paper copy of the order. (DSMF ¶¶ 20, 22; PSMF ¶¶ 47-50, 52.) D'Anna did not curse, scream, lie, threaten physical violence, warn or incite Tyler or Chris, or make contact with Defendant.[5] (PSMF ¶¶ 51, 53-55.) Defendant warned D'Anna that if she continued, he would arrest her for obstruction. (Compl. ¶ 47; DSMF ¶ 24; cf. PSMF ¶ 57.) Defendant then moved toward D'Anna, grabbed her right hand, and spun her around, causing her to fall to the floor. (DSMF ¶ 25; PSMF ¶ 58.) Defendant's arm got caught as he reached back, allowing D'Anna to get up and flee into a nearby bathroom. (DSMF ¶¶ 25-26; PSMF ¶¶ 58-60.)

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[5] Defendant asserts that he had to ask D'Anna repeatedly to calm down and that he was concerned that D'Anna was diverting his attention, increasing the stress level and danger to the officers, instigating Tyler and Chris, who ceased cooperating, and hindering the officers' ability to efficiently take Tyler into custody and leave. (DSMF ¶¶ 22, 24.)

As D'Anna reached the bathroom door, Defendant grabbed her by the arm, spun her around, and struck her across the face with his hand.[6] (PSMF¶ 61.) As a result, D'Anna fell to the bathroom floor.7 (DSMF ¶ 30; PSMF¶ 62.) Defendant then grabbed D'Anna's feet and dragged her out of the bathroom into the hallway while D'Anna kicked and attempted to free her feet from Defendant's grip. (DSMF ¶¶ 31-32; D'Anna Dep. at 124-25.) Both Defendant and Sergeant Walker attempted to flip D'Anna onto her stomach and restrain her while D'Anna screamed and continued to struggle and resist. (DSMF ¶¶ 33-34.) While the officers continued their attempt to restrain D'Anna, Plaintiff Gary Bates ("Gary") returned home. (DSMF ¶¶ 38-39.) Upon Gary's return, D'Anna stopped struggling, and the officers allowed her to get up off the floor, having only handcuffed one of her wrists successfully.(DSMF ¶ 39.)

During the struggle to restrain D'Anna, Tyler had closed the bedroom door, climbed out the window, and run away. (DSMF ¶¶ 36-37.) Defendant chased after Tyler and ran out a side door of the house that had no steps, causing Defendant to fall approximately three feet to the ground.[8] (PSMF¶ 71.) After enlisting other officers in the search,

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[6] Defendant asserts that D'Anna continued to resist, struggle, and attempt to lock herself in the bathroom. (DSMF ¶ 28.) During the struggle, his hand slipped from D'Anna's shoulder and accidentally contacted her cheek. (DSMF ¶ 29.)

[7] Defendant asserts that D'Anna did not fall. (DSMF ¶ 30.) Plaintiff asserts that she suffered significant injury as a result of the fall. (PSMF ¶¶ 93-95.)

[8] Defendant asserts that D'Anna injured his groin in the struggle by kicking him there. (DSMF ¶¶ 41, 45, 55.) He went to the hospital for treatment for a groin injury. (Id. ¶ 45.) Plaintiffs do not dispute the fact that Defendant went to the hospital on March 21, 2003. (PSMF ¶ 78.)

Tyler was found some time later. (DSMF ¶ 42.) While the officers were searching for Tyler, D'Anna removed the one handcuff, took a shower, called her sister, and freely moved about the house. (DSMF ¶ 43; PSMF ¶ 69.) When Defendant returned to the house after the search, he arrested D'Anna for felony obstruction. (DSMF ¶ 44; PSMF ¶ 74.)

Following her release on bond, D'Anna returned to the Pike County Sheriff's Office and filed an internal affairs complaint against Defendant. (DSMF ¶ 46; PSMF ¶ 76.) In the internal affairs complaint, D'Anna stated that she "started fighting back after being hit and was kicking out" until Gary appeared. (DSMF ¶ 47; D'Anna Dep., Exh. 11.) On March 24, 2003, the internal affairs investigator called D'Anna in an attempt to speak with Sarah, Hannah, and Chris as part of the investigation, but D'Anna would not permit the investigator access to them. (DSMF ¶ 50.) Defendant participated in the investigation by submitting to an interview and providing his version of the events. (DSMF ¶ 53.) The investigator concluded that D'Anna's complaint was unsubstantiated. (DSMF ¶ 54; Sheriff Jimmy Thomas Decl., Exh. 1.)

On March 27, 2003, Defendant appeared before a Pike County magistrate judge and swore out a warrant for aggravated battery against D'Anna based on his allegations that she knowingly kicked him in the groin during the struggle on March 21, 2003. (DSMF ¶¶ 56-59; PSMF ¶ 83.) On April 2, 2003, officers from the Pike County Sheriff's Office, not including Defendant, executed the warrant and took D'Anna into custody, and she was released on bond later that day. (DSMF ¶¶ 60-61; PSMF ¶¶ 87, 92.) The battery charge was later dismissed, but a grand jury indicted D'Anna for felony obstruction. (DSMF ¶¶ 64-65.) D'Anna filed a motion in limine arguing that the officers, including Defendant, illegally entered her house on March

21, 2003, which the trial court denied. (DSMF ¶ 66.) The trial court also denied her motion for directed verdict following the close of the state's evidence. (Id.) On December 2, 2004, the jury acquitted D'Anna of the felony obstruction charge. (Id. ¶ 67.)

Plaintiffs then filed the Complaint, alleging 42 U.S.C. § 1983 claims against Defendant for false arrest for the March 21, 2003, and April 2, 2003, arrests of D'Anna; excessive force for the March 21, 2003, arrest; malicious prosecution; retaliation for filing an internal affairs complaint; and a loss of consortium claim under Georgia law. Defendant moved for summary judgment on all counts, asserting qualified immunity on the § 1983 claims.

II. Summary Judgment Standard

Summary judgment is proper when no genuine issues of material fact are present and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The movant carries the initial burden and must show the Court that there is "an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). "Only when that burden has been met does the burden shift to the nonmoving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required "to go beyond the pleadings" and to present competent evidence in the form of affidavits, depositions, admissions and the like, designating "'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324, 106 S. Ct. at 2553 (quoting Fed. R. Civ. P. 56(e)). "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). Resolving all doubts in favor of the nonmoving party, the Court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." Id.

III. Qualified Immunity Standard

Qualified immunity offers complete protection for government officials sued in their individual capacities, allowing them to carry out their discretionary duties without fear of personal liability or harassing litigation. Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002). Only in exceptional cases will government officials be unprotected, Redd v. City of Enterprise, 140 F.3d 1378, 1382 (11th Cir. 1998), because qualified immunity protects from suit all but the plainly incompetent or those who knowingly violate the law. Vinyard, 311 F.3d at 1346 (citing Lee v. Ferraro, 284 F.3d 1188, 1194 (11th Cir. 2002)); accord Purcell v. Toombs County, Georgia, 400 F.3d 1313, 1319 (11th Cir. 2005) (citation omitted). In determining whether Defendant is entitled to qualified immunity, the Court must determine whether his actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Hope v. Pelzer, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515 (2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982)). If not, then Defendant is not liable for his conduct. The policy behind this immunity is "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." Id. (citation omitted).

To succeed on the defense of qualified immunity, Defendant must first show that he were acting within the scope of his discretionary authority. See Storck v. City of Coral Springs, 354 F.3d 1307, 1314 (11th Cir. 2003). If

Defendant meets this initial burden, the Court must engage in a two-part inquiry. First, the Court must determine whether Plaintiffs' allegations, if true, establish a constitutional violation. Pelzer, 536 U.S. at 736, 122 S. Ct. at 2513. Even if they do, the Court must nevertheless determine whether Defendant is entitled to qualified immunity, an inquiry which asks whether his actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 739, 122 S. Ct. at 2515 (quoting Harlow, 457 U.S. at 818, 102 S. Ct. at 2738). In order to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 (1987). The unlawfulness of Defendant's actions must be apparent under preexisting law, but Plaintiffs need not show that courts have held the precise actions taken were unlawful. See Pelzer, 536 U.S. at 739, 122 S. Ct. at 2515. Rather, the essential question is whether the law[9] on March 21, 2003, gave Defendant fair warning that his conduct deprived Plaintiffs of a constitutional right. See id. at 741, 122 S. Ct. at 2516 (observing that even in novel factual circumstances officials may be on notice that their conduct violates clearly established law).

IV. Analysis

Initially, it is clear that all of Defendant's actions at issue were within his discretionary authority. Therefore, the Court turns to whether each action was unconstitutional.

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[9] The relevant law includes cases from only the U.S. Supreme Court, the U.S. Court of Appeals for the Eleventh Circuit, and the Georgia Supreme Court. Vinyard v. Wilson, 311 F.3d 1340, 1351 n.22 (11th Cir. 2002).

A. March 21, 2003, Unlawful Arrest Claim

1. Constitutional Violation

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. It is a "'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, 445 U.S. 573, 586, 100 S. Ct. 1371, 1380 (1980). This basic principle is founded on "the very core" of the Fourth Amendment: "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Id. at 590, 100 S. Ct. at 1382 (quoting Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 683 (1961)). The sanctity of the home is afforded special protection under the Fourth Amendment, such that "the reasons for upholding warrantless arrests in a public place do not apply to warrantless invasions of the privacy of the home." Id. at 576, 100 S. Ct. at 1375. "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Id. at 590, 100 S. Ct. at 1382. "As Payton makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home." Kirk v. Louisiana, 536 U.S. 635, 638, 122 S. Ct. 2458, 2459 (2002). Additionally, the prohibition on warrantless in-home arrests does not apply to situations where voluntary consent to enter has been obtained. See Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797 (1990); Holmes v. Kucynda, 321 F.3d 1069, 1078-79 (11th Cir. 2003). As the foregoing makes clear, a warrantless arrest in a home violates the Fourth Amendment unless the arresting officer

had probable cause to make the arrest and either consent to enter or exigent circumstances demanding that the officer enter the home without a warrant.

It is undisputed that Defendant and Sergeant Walker did not have an arrest warrant for D'Anna prior to entering her home and arresting her on March 21, 2003. Therefore, the warrantless arrest inside her home was presumptively unreasonable, even assuming that probable cause existed for the arrest. See Payton, 445 U.S. at 588-89, 100 S. Ct. at 1381; United States v. Edmondson, 791 F.2d 1512, 1515 (11th Cir. 1986) ("A finding of probable cause alone . . . does not justify a warrantless arrest at a suspect's home."). Defendant must show that his presence in the home was justified either by exigent circumstances or consent. This is true even assuming that the civil commitment order Defendant was attempting to enforce was the equivalent of a criminal arrest warrant. See Steagald v. United States, 451 U.S. 204, 213-16, 101 S. Ct. 1642, 1648-49 (1981) (absent exigent circumstances or consent, search warrant required to enter one person's residence to execute an arrest warrant on another person believed to be in that residence).

The exigent circumstances exception to the warrant requirement recognizes a "'warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant.'" United States v. Holloway, 290 F.3d 1331, 1334 (11th Cir. 2002) (quoting Michigan v. Tyler, 436 U.S. 499, 509, 98 S. Ct. 1942, 1949 (1978)). Situations in which exigent circumstances exist include: "danger of flight or escape, loss or destruction of evidence, risk of harm to the public or the police, mobility of a vehicle, and hot pursuit." Id. None of these exigencies existed at the time Defendant

entered the house.[10] At the time of entry, Defendant did not know if Tyler was in the house, as evidenced by his inquiries of Sarah and Hannah, so he cannot point to the danger of Tyler's flight or escape as an exigent circumstance. There is no evidence that an "emergency situation[] involving *endangerment to life" existed at the time Defendant* entered. See id. at 1337 (citing cases involving gunshots, stabbings, explosions, and reports of dead bodies).[11] Thus, exigent circumstances cannot justify Defendant's entry.

As to the issue of consent, it is undisputed that Sarah responded, "I don't know" when Defendant asked if he could enter and search the home. Defendant argues that Sarah and later Hannah provided consent for him to enter the house and search for Tyler, but Plaintiffs dispute this fact, arguing that Sarah and Hannah did not provide consent. Since this is a disputed material fact, at the summary

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[10] Only the knowledge Defendant had at the time is relevant to the inquiry. See, e.g., Davis v. Williams, 451 F.3d 759, 762 (11th Cir. 2006). D'Anna's status as a probationer is, thus, irrelevant, as there is no evidence that Defendant knew of that fact at the time.

[11] Defendant points to the commitment order as evidence of Tyler's imminent threat of violence to himself or others. The Court finds that this is not a valid exigency, as even if Defendant possessed an arrest warrant for Tyler, which might indicate an even greater possibility of imminent harm to himself or others, the warrant itself would not provide an exigent circumstance for the unwarranted entry into D'Anna's home.

Additionally, even if exigent circumstances, such as the discovery of Tyler in the bedroom or the confrontation between Defendant and D'Anna, arose after Defendant's entry, exigent circumstances arising after the entry do not justify the entry at the time it was made. The Court acknowledges the footnote in Bashir v. Rockdale County, Ga., 445 F.3d 1323, 1328 n.6 (11th Cir. 2006), but cannot find any support for such a distinction, and Defendant provides none.

judgment stage of the proceedings it must be construed in Plaintiffs' favor. Thus, Defendant did not have consent to enter.[12]

Therefore, Defendant's warrantless arrest of D'Anna in her home is presumptively unreasonable under the Fourth Amendment, and, viewing the record in the light most favorable to Plaintiffs, no exception to the warrant requirement justified Defendant's entry. Accordingly, Plaintiffs have established a constitutional violation by Defendant.

2. Clearly Established Law

The Court finds that, under the law existing at the time, it was clearly established that Defendant's conduct violated the Fourth Amendment. A reasonable law enforcement officer faced with these circumstances would have known he could not enter the home and arrest D'Anna without a warrant, exigent circumstances, or consent, even if he had probable cause once inside. That doing so would offend the Fourth Amendment was clearly established by the precedent recounted above, including Payton, 445 U.S. at 586, 100 S. Ct. at 1380. Accordingly, Defendant is not entitled to qualified immunity on Plaintiffs' March 21, 2003, unlawful arrest claim, and the Court **DENIES** summary

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[12] The Court will not apply collateral estoppel or the Rooker-Feldman doctrine to the issue of consent, despite Defendant's assertion that the doctrines apply due to D'Anna's filing of a motion in limine in the criminal case against her. The Court is not convinced that Plaintiffs had a full and fair opportunity to litigate the issue or that the state trial court's decision on the motion was "final." See Amos v. Glynn County Bd. of Tax Assessors, 347 F.3d 1249, 1265 n.11 (11th Cir. 2003) (Rooker-Feldman); Pleming v. Universal-Rundle Corp., 142 F.3d 1354, 1359-60 (11th Cir. 1998) (collateral estoppel).

judgment on this claim.

B. March 21, 2003, Excessive Force Claim[13]

It is clearly established that the use of excessive force in carrying out an arrest constitutes a violation of the Fourth Amendment. See Graham v. Connor, 490 U.S. 386, 394, 109 S. Ct. 1865, 1871 (1989). Whether the force used is reasonable turns on "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. at 396, 109 S. Ct. at 1872. An officer will be entitled to qualified immunity if his actions were "objectively reasonable"-that is, if a reasonable officer in the same situation would have believed that the force used was not excessive. See Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987).

"[S]ome use of force by a police officer when making a custodial arrest is necessary and altogether lawful, regardless of the severity of the alleged offense." Durruthy v. Pastor, 351 F.3d 1080, 1094 (11th Cir. 2003). Indeed, "'the application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth

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[13] "[A] claim that any force in an illegal stop or arrest is excessive is subsumed in the illegal stop or arrest claim and is not a discrete excessive force claim." Jackson v. Sauls, 206 F.3d 1156, 1171 & n.19 (11th Cir. 2000) (noting that an excessive force claim is subsumed where the plaintiff does "not argue that the force used was more than that reasonably necessary to effect a valid arrest."). Thus, the Court analyzes Plaintiffs' claim to the extent it is a discrete claim for excessive force during a legal arrest. See id. The Court notes that in analyzing the claim, it is unnecessary to determine whether Defendant had lawful authority to effect the arrest. See Bashir v. Rockdale County, Ga., 445 F.3d 1323, 1332 (11th Cir. 2006).

Amendment.'" Id. (quoting Nolin v. Isbell, 207 F.3d 1253, 1257 (11th Cir.2000)). De minimis force includes such actions as forcing a plaintiff down to the ground and placing her in handcuffs; grabbing a plaintiff from behind by the shoulder and wrist, throwing her against a van three or four feet away, kneeing her in the back and pushing her head into the side of the van, and handcuffing her; and slamming a plaintiff against a wall, kicking hers legs apart, requiring her to put her arms above her head, and pulling her wallet from her pants pocket. Id. (citing cases). Aggravation of a pre-existing injury by the force used in an arrest does not support a claim for excessive force where the arresting officer was unaware of the plaintiff's condition. Id. at 1094 n.10; Rodriguez v. Farrell, 280 F.3d 1341, 1351-52 (11th Cir. 2002) (painful handcuffing maneuver, which normally resulted in minimal injuries, was not excessive force where plaintiff subjected to the maneuver required extensive surgery and ultimately amputation of his arm).

Here, Defendant did not employ excessive force in his attempt to arrest D'Anna. While obstruction, the crime for which Defendant attempted to arrest D'Anna, was not a severe one, it is undisputed that D'Anna actively resisted Defendant's attempts to arrest her, which would justify an increased use of force. However, even if an increased use of force was not justified, the amount of force Defendant used in this case was de minimis. Construing the disputed facts in Plaintiffs' favor, Defendant grabbed D'Anna's arm and took her to the ground, then, after she escaped his grasp, he grabbed her again in the bathroom, stuck her across the face, and she either fell or was brought to the ground. After this, D'Anna continued to struggle and resist, to the point that the officers were only able to handcuff one of her hands. The force used by Defendant was not excessive, even if she sustained significant injury as a result of the fall in the bathroom. See Durruthy, 351 F.3d at 1094 & n.10.

Therefore, because there was no constitutional violation, it is not necessary to address whether the law was clearly established, and the Court **GRANTS** summary judgment to Defendant on this claim.

C. April 2, 2003. Unlawful Arrest Claim

Plaintiffs argue that Defendant knew that the facts he set out in the March 27, 2003, warrant were false and that no probable cause existed to support the warrant application, in violation of the Fourth Amendment.

The Warrant Clause of the Fourth Amendment requires that warrant applications contain sufficient information to establish probable cause. Franks v. Delaware, 438 U.S. 154, 164, 98 S. Ct. 2674, 2680-81 (1978). "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing." Id. at 164-65, 98 S. Ct. at 2681 (citation omitted). While this condition does not dictate that the statements be objectively accurate, it does require that they "be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." Id. at 165, 98 S. Ct. at 2681. Thus, a police officer may be held liable under § 1983 for submitting an application for an arrest warrant that contains false information. See Malley v. Briggs, 475 U.S. 335, 346, 106 S. Ct. 1092, 1098 (1986); Jones v. Cannon, 174 F.3d 1271, 1285 (11th Cir. 1999). If "a reasonable police officer would have known that [the officer's affidavit or] testimony was not just negligently false, but recklessly so," then the defendant officer is not entitled to qualified immunity. Kelly v. Curtis, 21 F.3d 1544, 1554 (11th Cir. 1994).

Qualified immunity also does not protect an officer

who seeks a warrant on the basis of an affidavit that does not show reasonably objective probable cause, even if a magistrate erroneously issues the warrant. The relevant question is "whether a reasonably well-trained officer . . . would have known that his affidavit failed to establish probable cause and that he should not have applied for a warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest." Malley, 475 U.S. at 345, 106 S. Ct. at 1098 (footnote omitted).

It is undisputed that D'Anna struggled and kicked while Defendant and Sergeant Walker attempted to restrain her and that Defendant went to the emergency room for treatment for an injury to his groin area. The facts Defendant set out in the warrant affidavit[14] are thus not recklessly false. See Kelly, 21 F.3d at 1554.

Further, the Court finds that the affidavit was sufficient to establish probable cause. Although brief, the affidavit is not so conclusory or lacking in Defendant's personal knowledge of the facts set forth as to be constitutionally deficient. See id. at 1555. The text of the affidavit indicates that the events described happened to Defendant, which satisfies the personal knowledge requirement. The text also describes the particular events that occurred and does not merely list the elements of the crime or a conclusion that a crime was committed. Since "[p]robable cause does not require the same type of specific

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[14] The affidavit stated: "16-5-24 Aggravated Battery. For the said Bates, Dianna Dawn did violate O.C.G.A. 16-5-24 when he/she willingly and knowingly maliciously cause [sic] bodily harm to the person of Deputy Lee Harvey, by violently kicking him in the groin area causing him excessive pain and having to go to the emergency room four hours after the altercation." (Harvey Decl., Exh. 2.)

evidence of each element of the offense as would be needed to support a conviction," Adams v. Williams, 407 U.S. 143, 149, 92 S. Ct. 1921, 1924 (1972), the fact that the affidavit does not show how the facts meet each element of aggravated battery[15] does not render Defendant's application for the warrant objectively unreasonable. Therefore, because the warrant was supported by probable cause, Defendant did not commit a constitutional violation by applying for it. Accordingly, because there was no constitutional violation, it is not necessary to address whether the law was clearly established, and the Court **GRANTS** summary judgment to Defendant on this claim.

D. Malicious Prosecution Claim

The Eleventh Circuit "has identified malicious prosecution as a violation of the Fourth Amendment and a viable constitutional tort cognizable under § 1983." Wood v. Kesler, 323 F.3d 872, 881 (11th Cir. 2003). "To establish a federal malicious prosecution claim under § 1983, a plaintiff must prove (1) the elements of the common law tort of malicious prosecution, and (2) a violation of her Fourth Amendment right to be free from unreasonable seizures." Kingsland v. City of Miami, 382 F.3d 1220, 1234 (11th Cir. 2004).[16] It is a two-part showing, and to avoid summary judgment for Defendant on her claim, "[Plaintiff] bears the

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[15] Under Georgia law, "[a] person commits the offense of aggravated battery when he or she maliciously causes bodily harm to another by depriving him or her of a member of his or her body, by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member thereof." O.C.G.A. § 16-5-24.

[16] The elements for the common law tort of malicious prosecution include (1) a criminal prosecution instituted or continued by the defendant, (2) with malice and without probable cause, (3) that terminated in the plaintiff's favor and (4) that caused damage to the plaintiff. Wood, 323 F.3d at 881-82.

burden of proving that she was seized in relation to the prosecution, in violation of her constitutional rights." Id. At 1235.

Plaintiffs bring malicious prosecution claims based on D'Anna's arrests on March 21, 2003, and April 2, 2003, and her subsequent prosecution for obstruction. Defendant argues that D'Anna was not sufficiently seized to implicate the Fourth Amendment. With respect to D'Anna's March 21, 2003, arrest, the Court agrees with Defendant. On March 21, 2003, D'Anna was arrested without a warrant for felony obstruction.[17] "In the case of a warrantless arrest, the judicial proceeding does not begin until the party is arraigned or indicted." Kingsland, 382 F.3d at 1235. D'Anna's March 21 arrest cannot serve as the predicate seizure, and there is no evidence that the conditions of her pretrial release or court appearances constituted a seizure in violation of the Fourth Amendment. Id. at 1236; see also Nieves v. McSweeney, 241 F.3d 46, 55-56 (1st Cir. 2001) (plaintiffs' pretrial stress and damaged reputations, appearance in court, and endurance of trial insufficient to establish Fourth Amendment seizure). Thus, Plaintiffs do not have a cognizable claim for malicious prosecution for D'Anna's March 21, 2003, arrest.

Turning to the April 2, 2003, arrest, Plaintiffs have satisfied the seizure requirement. See Whiting v. Traylor, 85 F.3d 581, 585-86 (11th Cir. 1996) (holding that an arrest after the issuance of arrest warrant is a sufficient seizure following the institution of prosecution). However, Plaintiffs

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[17] The Court notes that on March 21, 2003, Defendant applied for and was issued a warrant for felony obstruction. (Pls.' Statement of Material Facts, Exh. 15.) However, it is undisputed that D'Anna was arrested without a warrant and before the warrant was issued. (See D'Anna Dep. at 174-75, 178-79; Defendant Dep. at 87; Pls.' Mem. of Law in Resp. to Def.'s Mot. for Summ. J. at 26.)

have not shown that Defendant acted without probable cause. As discussed above, Defendant had probable cause to seek the arrest warrant, as evidenced by the accompanying affidavit. Therefore, because prosecution was initiated with probable cause, Plaintiffs cannot establish the elements of the common law tort of malicious prosecution, and their claim based on the April 2, 2003, arrest fails. Accordingly, because there was no constitutional violation, it is not necessary to address whether the law was clearly established, and the Court **GRANTS** summary judgment to Defendant on this claim.

E. First Amendment Retaliation Claim

Plaintiffs bring a claim of retaliation based on D'Anna's filing of an internal affairs complaint against Defendant and her subsequent arrest for aggravated battery on April 2, 2003. Defendant argues that D'Anna abandoned her internal affairs complaint before he obtained the warrant and that there is no causal connection between the warrant and the internal affairs complaint.

> To state a retaliation claim, the commonly accepted formulation requires that a plaintiff must establish first, that h[er] speech or act was constitutionally protected; second, that the defendant's retaliatory conduct adversely affected the protected speech; and third, that there is a causal connection between the retaliatory actions and the adverse effect on speech.

Bennett v. Hendrix, 423 F.3d 1247, 1250 (11th Cir. 2005), cert. denied, 127 S.Ct. 37 (2006). However, a retaliation claim is defeated by the existence of 24
probable cause. See Wood, 323 F.3d at 883. As discussed above, Defendant had probable cause to seek the arrest warrant. That probable cause nullifies any retaliatory

motive Defendant may have had. Therefore, there was no constitutional violation, and the Court **GRANTS** summary judgment to Defendant on this claim.

F. Loss of Consortium Claim

Although they raised a loss of consortium claim in their Complaint, Plaintiffs failed to respond to that issue in their response to Defendant's Summary Judgment Motion. (See generally Pls.' Mem. of Law in Opposition to Def.'s Mot. for Summ. J.) "[A] party's failure to respond to any portion or claim in a motion indicates such portion, claim or defense is unopposed." Kramer v. Gwinnett County, Ga., 306 .Supp.2d 1219, 1221 (N.D. Ga. 2004) (Evans, J.); see also N.D. Ga. R. 7.1B. Because Plaintiffs failed to respond to Defendant's argument regarding their loss of consortium claim, the Court deems the claim abandoned. See Sherk v. Adesa Atlanta, LLC, 432 F.Supp.2d 1358, 1374 (N.D. Ga. 2006) (Camp, J.). Accordingly, the Court **GRANTS** summary judgment to Defendant on this claim.

V. Conclusion

Defendant's motion for summary judgment [#36] is **GRANTED in part** and **DENIED in part**. Specifically, the motion is **GRANTED** on all claims except Plaintiffs' March 21, 2003, unlawful arrest claim. Defendant's motion is **DENIED** with respect to that claim.

SO ORDERED, this 8th day of January, 2007.

/s/Jack Camp
JACK T. CAMP
UNITED STATES DISTRICT JUDGE